**THE OWNERS OF THE CARGO CARRIED IN THE SHIP "SANTORINI 1"**

**v.**

**THE OWNERS OF THE SHIP AND OTHER PERSONS INTERESTED IN THE SHIP "SANTORINI 1"**

HIGH COURT MALAYA, KUALA LUMPUR
DATO' V.C. GEORGE J
[ADMIRALTY IN REM NO. D3-27-28-94]
30 SEPTEMBER 1994

***MARITIME LAW**: Cargo owner effecting arrest of ship - Application to set aside warrant of arrest - Whether there was non-disclosure of material facts at the time of making the application for arrest - Whether defendant entitled to have warrant of arrest discharged.*

The plaintiffs are shippers of a cargo of 15,741 metric tons of Coke which was loaded on the "Santorini 1" (the ship) at Xingang and discharged at Flushing in Holland. The Master of the ship released the cargo without the production of the bill of lading. The consignee thereafter refused to accept the cargo and there were serious attempts to negotiate a new price for the cargo. On the failure of these negotiations, the plaintiff attempted to locate the cargo but could not do so. The plaintiff then applied for and obtained a warrant of arrest on the ship.

In the defendants application to set aside the warrant of arrest, it was contended that there was a failure on the part of the plaintiff to disclose the fact of the negotiations which it was said were material facts, the non-disclosure of which entitles them to have the warrant of arrest discharged.

The defendants argued that in the circumstances of the case the only claim the plaintiff has is *in personam* against the charterer and that the claim against the owner of the vessel is misconceived and consequently the warrant of arrest should be set aside or discharged.

**Held:**

**[1]** That the plaintiffs had negotiated with the consignee and/or the charterer does not *per se* have the effect of doing away with the rights *in rem* that the plaintiffs have *vis a vis* the owners of the vessel.

**[2]** What in effect was an attempt to mitigate the loss arising from the breach of the arrangement on the part of the Master of the vessel, in releasing the cargo without the production of the bill of lading, does not have the effect of a waiver of rights. The contract of affreightment or carriage between the plaintiffs and the owner of the vessel is separate and distinct from the sale contract with the charterer.

**[3]** Order 70 r. 4 of the Rules of the High Court 1980 specifies what has to be disclosed to the Court in support of the praecipe for a warrant of arrest of a ship. Whilst it was doubtless true that other material information should also be provided, the non-disclosure of the fact that there were negotiations and that there were attempts to mitigate the damage are not material to the issue of a warrant of arrest.

**[4]** What the shipowner has put up here are defences which have to be adjudicated elsewhere. If the shipowner succeeds in his contention that the cargo was released to the true owner who was entitled to such release when it was effected, no damages would be recoverable. However the warrant of arrest was properly issued and should not be discharged until the disposal of the claim.

*[Application to set aside warrant of arrest dismissed with costs]*

**Case referred to:**
*Kuwait Petroleum Corporation v. I & D Oil Carriers Ltd (unreported)* ***(refd)***
*Vasso [1984] 1 LLLR 235* ***(refd)***

**Legislation referred to:**
Courts of Judicature Act 1964, s. 24 (b)
Supreme Court Act 1981, s. 20 (2) (g) (h) (UK)
Rules of High Court 1980, O. 70 r. 4
Rules of the Supreme Court, O. 75 r. 5(1) (UK)

*For the plaintiffs - Joyrama Appusamy; M/s. Shearn Delamore & Co.*
*For the defendant - M. David Morais; M/s. M. David Morais.*

**JUDGMENT**

**V.C.George J:**

This is an application to set aside the warrant of arrest of the ship "Santorini 1".

The admiralty jurisdiction of the High Court stems from s. 24 (b) of the Courts of Judicature Act 1964 which provides that the civil jurisdiction of the Court shall include the same jurisdiction and authority in relation to matters of admiralty as is heard by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981 s. 20 of which *inter alia* provides that the Admiralty jurisdiction of the Court shall include the jurisdiction to hear and determine any of the questions and claims mentioned in sub-section 2 of the section which includes any claim for loss of or damage to goods carried in a ship and any claim arising out of any agreement relating to the carriage of goods in a ship (s. 20 (2) (g) and (h)).

The rules pertaining to the admiralty jurisdiction of the Court is in O. 70 of the Rules of High Court. Rule 4 thereof provides that a warrant for the arrest of a ship may be issued after a writ has been issued in an action *in rem*. The prescribed praecipe requesting the issue of a warrant is to be accompanied by an affidavit containing the particulars required by para (6), (7) and (8) of r. 4.

What is required by the rules, in the context of the facts of the instant case, to be in the affidavit in support of a warrant of arrest to issue include particulars of the applicant and of the nature of his claim, whether the ship is the ship in connection with which the claim in the action arose and that the person who would be liable on the claim in an action *in personam* is the owner or charterer or in possession or control of the ship and at the time the writ issued was the beneficial owner of all the shares in the ship. The grounds for such belief has to be disclosed.

It was urged on the Court that the policy of O. 70 r. 4 is that the merits of the claim need not be gone into at this interlocutory stage. Some confirmation of this was said to be provided by the outline form of affidavit in support of the praecipe suggested by the 1991 White Book at 75/5/9.

In the "*Vasso*" [1984] 1 LLLR 235 at 241 Lord Justice Robert Goff says with reference to a rule equipolant to our O. 70 r. 4 (1) (English O. 75 r. 5 (1)):

> This rule reflects the simple fact that, subject to the filing of the necessary praecipe and affidavit, the only prerequisite to the Court's jurisdiction to issue a warrant for arrest is that a writ must have been issued in an action *in rem*. So, provided that a writ is issued upon which there is endorsed a claim falling within one of those lettered sub-paragraphs of s. 1 (1)

of the 1956 Act (now s. 20 (2) of the 1981 Act which are specified in s. 3 (4) of the 1956 Act (now s. 21 (4) of the 1981 Act) as justifying the invocation of the Admiralty jurisdiction by an action *in rem*, the Court, in our judgment, has jurisdiction to issue a warrant for the arrest of the relevant ship, and to execute that warrant, the exercise of that jurisdiction being regulated by the relevant rules in O. 75.

In our judgment, the purpose of the plaintiff in invoking the Admiralty jurisdiction cannot affect the existence of the jurisdiction. The jurisdiction is simply there. The Court has the power to arrest. But the exercise of the power is, as O. 75, r. 5(1) shows, not mandatory; the Court may decline to exercise it. Furthermore, under r. 13 (4) of O. 75, the Court has a discretionary power to order the release of property under arrest. The Court's decision whether to exercise either of those powers may be affected by the manner in which, or the purpose for which, the plaintiff has proceeded.

It is not contended by the application that in seeking the warrant of arrest the plaintiffs had not met the requirements of O. 70 r. 4. One of the complaints is that on the facts of the instant case the plaintiffs should have disclosed certain other facts which they say are material facts the non-disclosure of which entitles them to have the warrant of arrest discharged.

The plaintiffs are shippers of a cargo of 15,741 metric tons (m.t.) of Coke which was loaded on the "Santorini 1" at Xingang China under a bill of lading dated 6 October 1993. The plaintiffs had sold the coke to Thyssen - Agipcoal GmbH of Germany (Thyssen). Payment was to be made by a letter of credit (LC ) which was opened by Thyssen at its bank Trinkhaus and Burkhardt of Dusseldorf. The owners of the vessel had by a voyage charterparty chartered the ship to Thyssen to carry a cargo of coke (part of which was to be the said 15,741 m.t.) from Xingang. The loading of the 15,741 m.t. of coke was completed at Xingang on 6 October 1993. The aggregate weight of coke loaded on to the vessel was 27,954 m.t. The extra 12,213 m.t. had been loaded earlier on 2 October 1993. By the terms of the charterparty Thyssen had the conduct of the performance of the voyage. In fact when the voyage commenced the plaintiffs did not know at which port in Europe the coke was to be discharged. Eventually it was said to have been discharged at Flushing in Holland on the 18/19 November 1993 on the instructions of Thyssen.

It was in the contemplation of the parties that Thyssen may sell the coke to a third party. The consignee or any such third party was expected to honour the LC which was an "on sight" LC by effecting payment to be made at the Trinkhaus and Bukrhart Bank in Dusseldorf which would result in the shipping documents including the Bill of Lading being given to the payor who would then be able to present it to the Master of the vessel at the port of discharge and on the basis of such presentation the Master would have released the cargo to the holder of the bill of lading.

The shipping documents including the bill of lading arrived at the Dusseldorf Bank in good time on or before 2 November 1993 and Thyssen was informed of this. But they apparently alleged certain irregularities in respect of the documents and rejected the documents. Apparently they were not prepared to waive the irregularities. However it would appear that although in effect they had not completed the purchase of the coke in that they had refused to negotiate the LC, they purported to sell this coke to a third party (who turned out to be a subsidiary of theirs referred to as RTE) on or about 5 November 1993 and appear to have misrepresented to the Master of the vessel when it arrived at Flushing on or about 18 November 1993, that the bill of lading had not arrived and had pursuaded him to release the coke to RTE against a letter of indemnity provided by Thyssen.

Thereafter RTE on or about 23 November 1993 purported to reject the cargo apparently on the basis of an analysis of the cargo at Flushing. In the evidence provided by the defendant to the Court in respect of this analysis there appears to be a deliberate (and if I may say so stupid) attempt to blank out certain figures from the report of the analysis which figures if disclosed, it would seem would have shown that the analysis carried out at Flushing was not of the 15,741 m.t. but of the whole 27,954 m.t. of coke and as such could prove to be useless to support the contention that 15,741 m.t. did not meet the specifications.

In rejecting the cargo RTE had informed the plaintiffs by telefax that the 15,741 m.t. of coke "is for your immediate disposal in Flushing" and that the LC would not be negotiated.

Thereafter there was a serious attempt to negotiate a new price for the cargo between the plaintiffs and RTE or Thyssen and when that failed attempts were made to locate the cargo by the plaintiffs and/or their agents but it or most of it apparently could not be located.

For the defendant it is contended that in the circumstances the only claim the plaintiff have is *in personam* against RTE and/or Thyssen; that the claim on the owner of the vessel is misconceived that the warrant of arrest should be set aside or be discharged and consequential orders be made.

In my judgment, that the plaintiffs had negotiated with RTE and/or Thyssen for payment does not *per se* have the effect of doing away with the rights *in rem* that the plaintiffs have *vis a vis* the owners of the vessel. What in effect was an attempt to mitigate the loss arising from the breach of the arrangement on the part of the Master of the vessel (releasing the cargo without the production of the bill of lading) does not have the effect of a waiver of rights.

The contract of affreightment or carriage between the plaintiffs and the owner of the vessel is separate and distinct from the sale contract with Thyssen.

As has been seen O. 70 r. 4 specifies what has to be disclosed to the Court in support of the praecipe for a warrant of arrest of a ship. No doubt other material information should also be provided. However the non-disclosure of the fact that there were those negotiations, that there were attempts to mitigate the damage, are not, in my judgment, material to the issue of a warrant of arrest.

It is conceded that delivery of the cargo without production of the bill of lading was in breach of the contract of carriage. However it is contended that delivery to the person entitled is good delivery even though the bill of lading was not produced. RTE they say is the person entitled. The basis of saying that is Thyssen saying so and RTE confirming it. That I do not think is good enough. However and in any event I do not think anything turns on that *vis a vis* the issue of the warrant of arrest or the application to set aside. In the unreported judgment of the English Court of Appeal, in *Kuwait Petroleum Corporation v. I & D Oil Carriers Ltd.* that was handed down on 21 July 1994 - Neill LJ speaking for the Court said at p. 39 of the draft judgment:

> I can see no good reason to depart from the general rule that the owners do not fulfil their contractual obligations if the cargo is delivered to a person who cannot produce the bill of lading. Of course if such a delivery is made and the person to whom the cargo is delivered proves to be the true owner no damages would recoverable. In this context it is helpful to draw attention to the speech of Lord Blackburn in *Glyn Mills & Co. v. East and West India Dock Co.* [1882] 7 App. Cas. 591 at 610:

> [The master] would not fulfil his contract if he delivered [the goods] to anyone [other than someone producing the bill of lading] though if the person to whom he delivered was really entitled to the possession of the goods, no one might be entitled to recover damages from him for that breach of contract.

Whether the plaintiffs are entitled to damages has to be tried but the claim *in rem* has not been extinguished and I am satisfied that there has not been any material non-disclosure as alleged or at all.

What the shipowner has put up here are defences which have to be adjudicated elsewhere. If he succeeds in his contention that the cargo was released to the true owner who was entitled to such release when it was effected, no damages would be recoverable. However the warrant of arrest was properly issued and should not be discharged until the disposal of the claim which Counsel informs me has been made in another jurisdiction. The application encl. (25) is dismissed with costs.